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November 4, 1993

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Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and six (6) copies of its "Consolidated Replies to Proposed Findings and Conclusions."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:


John W. Hunter


By:


Stephen T. Felverton

Enclosure

B:CATON.117

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

MM Docket No. 93-107

File Nos. BPH-911230MA

through

BPH-911231MB

To: Administrative Law Judge
Walter C. Miller

CONSOLIDATED REPLY TO PROPOSED
FINDINGS AND CONCLUSIONS

Respectfully submitted,

MCHAIR & SANFORD, P.A.

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November 4, 1993

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SUMMARY

The proposed conclusions of law of Shellee F. Davis as to the new nighttime service to under-served areas to be provided by Ohio Radio Associates, Inc. are erroneous and must be rejected. Contrary to the assertions of Davis, ORA's new nighttime service is decisionally significant and thus deserving of a preference in view of the fact that neither Davis nor the other competing applicants would provide any new nighttime service to under-served areas.

The proposed conclusions of law of ASF Broadcasting Corp. as to this matter of nighttime coverage must also be rejected. It failed to cite to any case precedent in support of its assertions.

David A. Ringer must be denied all integration credit. In his proposed findings of fact, he failed to advance a specific and convincing proposal to divest or terminate his current full-time occupation and business as a land developer. Ringer simply failed to meet his burden of proceeding with the evidence and his burden of proof as to this matter.

CONSOLIDATED REPLIES TO PROPOSED FINDINGS AND CONCLUSIONS

Introduction

1. Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 1.263 and 1.264 of the Commission's Rules, hereby submits its consolidated replies to the proposed findings of fact and conclusions of law of Shellee F. Davis ("Davis"), ASF Broadcasting Corp. ("ASF"), and David A. Ringer ("Ringer"). The failure of ORA to comment on any particular proposed finding of fact or conclusion of law should not be construed as a concession as to the accuracy of the proposed finding or conclusion. In reply to the proposed findings of fact and conclusions of law, ORA submits the following comments.

Replies to Shellee F. Davis

2. Davis, in her proposed conclusions of law, at paras. 98-99, contends that ORA would be entitled to no decisionally significant comparative signal coverage advantage based upon its provision of new nighttime service to under-served areas. However, Davis relies upon cases which are inapposite and factually distinguishable. In those cases, only a new 5th service would be provided, there were off-setting coverage preferences, all the applicants would provide some new nighttime service to under-served areas, or there was new service to a smaller number of persons than would be provided by ORA. Both a new 4th and 5th nighttime service to 2,434 persons would be provided by ORA. Davis would provide no new nighttime service to under-served areas and would not be entitled to any off-setting coverage preference. Davis proposed findings, at paras. 48-49.

3. Davis' reliance upon Barry Skidelsky, 7 FCC Rcd 1, 11, n. 15 (Rev. Bd. 1992), is woefully misplaced. There, the provision of a new 3rd nighttime service to 912 persons was decisionally insignificant because another applicant would provide a new 2nd nighttime service to 2,834 persons. Id., 10, para. 48. Davis would provide no new nighttime service to under-served areas. Davis, proposed findings, at paras. 48-49.

4. Davis' reliance upon Mark L. Modlinger, 58 RR2d 1006, 1013-1014 (Rev. Bd. 1984) is also woefully misplaced. There, no preference was given for the provision of a new 5th nighttime service because another applicant would provide

a new 4th nighttime service to a greater number of persons. Thus, the advantages were off-setting. Id., 1013-1014, para. 21. Davis would provide no new nighttime service to under-served areas. Davis, proposed findings, at paras. 48-49.

5. Davis conveniently ignores the holding of Mark L. Wodlinger, 1013-1014, paras. 20-21, that coverage preferences are awarded for substantial differences in the provision of 3rd, 4th, and even 5th new nighttime services. See also, Metro Broadcasting, Inc., 57 RR2d 440, 449, para. 18 (Rev. Bd. 1984); Christian Broadcasting of the Midlands, Inc., 57 RR2d 87, 91-92, para. 9 (Rev. Bd. 1984); Radio Jonesboro, Inc., 55 RR2d 991, 996-997, paras. 12-13 (Rev. Bd. 1984). In the instant case, ORA would provide new nighttime service to a total of 2,434 persons. Davis would provide no new nighttime service to under-served areas. Davis, proposed findings, at paras. 48-49. Accordingly, this is a substantial difference warranting a preference for ORA.

6. Davis, in her proposed conclusions of law, at para. 97, misstates Commission policy by suggesting that new nighttime service provided by an applicant is considered substantial or insubstantial based upon the percentage of the new nighttime service to the overall service provided by that applicant. However, the correct analysis is the percentage difference between the applicants in the provision of new nighttime service. Radio Jonesboro, Inc., 997, para. 13, difference between the applicants of only 7.5% in new nighttime service is considered substantial difference warranting a preference. In the instant case, ORA's advantage in the provision of new nighttime service is 2,434 %. This is unquestionably a substantial difference between the coverage proposals of the other applicants and therefore warrants a preference for ORA.

7. Davis also erroneously relies upon Initial Decisions where the Review Board and the Commission apparently did not affirm that part of the decision dealing with signal coverage. Accordingly these cases have no precedential value. The Mass Media Bureau, in its proposed conclusions of law, at para. 1, correctly cites controlling Commission precedent as to this matter. See,

Northern Sun Corp., 100 FCC2d 889, 894, paras. 9-10 (Rev. Bd. 1984), very slight coverage preference awarded for provision of new nighttime service to under-served areas.

8. ORA's provision of new nighttime coverage, however slight, is of potential decisional significance. In the event that Davis and the other applicants are denied integration credit, signal coverage becomes the deciding factor in this proceeding. Although ORA would provide new nighttime service to only 2,434 persons, this is nevertheless a clear-cut difference in the proposals of the competing applicants. The other applicants would provide no new nighttime service to under-served areas. In close comparative cases, even small differences can tilt the decision.

Replies to ASF Broadcasting Corp.

9. ASF, in its proposed conclusions of law, at para. 48, similarly contends that ORA's advantage in nighttime coverage is "negligible" and thus not deserving of a preference. However, ASF cites to no case law. Its arguments must therefore be rejected as unsupported.

Replies to David A. Ringer

10. Ringer, in his proposed findings of fact, at para. 5, states that he will terminate all other employment in order to serve as General Manager of the proposed Westerville station. However, he fails to acknowledge his current employment as a land developer and fails to explain how it would be terminated. Moreover, he fails to acknowledge his existing land development business and fails to state whether it would be sold or new management would be obtained (Ringer Ex. 2, p. 1; Tr. 143, 157).

11. These omissions by Ringer and his failure to advance a specific and convincing proposal to divest or terminate his current full-time occupation and business are fatal to his integration pledge. The very existence of an outside business interest renders questionable an integration commitment in the absence of additional showings by the applicant as to the reliability of its integration pledge. Blancett Broadcasting Co., 17 FCC2d 227, 230, para. 7 (Rev. Bd. 1969).

Applicants have the burden to establish how they will effectuate their integration proposals. Cuban-American, Ltd., 5 FCC Rcd 3781, 3785, para. 28 (1990). To meet this burden, an applicant must present a detailed and convincing plan as to how it will accommodate outside business interests with its integration proposal. Maguabo Broadcasting Co., 6 FCC Rcd 912, 924, n. 63 (Rev. Bd. 1991).

Conclusion

12. Based upon the record evidence and upon Commission precedent, ORA is entitled to a decisionally significant signal coverage preference over the other applicants because of its provision of new nighttime service to under-served areas. Based upon the record evidence and upon Commission precedent, Ringer failed to carry his burden of proceeding with the evidence and burden of proof as to his integration pledge. Accordingly, he is entitled to no integration credit.

WHEREFORE, in view of the foregoing, the Presiding Judge is requested to adopt the proposed findings of fact and conclusions of law of ORA and to reject those of the other applicants.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

John W. Hunter

By: 

Stephen T. Felverton

November 4, 1993

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McMair & Sanford, P.A., do hereby certify that on this 4th day of November, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Consolidated Replies to Proposed Findings and Conclusions" to the following:

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